action of *de facto* directors where some ground for equitable jurisdiction is found.[22] Although the doctrine has been applied in controversies between rival claimants,[23] there seems no necessity for it and the better view is expressed by the recent case of *Stratton-Massachusetts Gold Mines Co.* v. *Davis* (Mass. 1916) 111 N. E. 375, in which *de facto* directors were denied the right to sue *de jure* directors in tort.[24] The doctrine should not be applied to questions of internal management and it would seem, in spite of a respectable array of authority to the contrary,[25] that the calls and subsequent forfeiture of stock by *de facto* directors cannot be enforced against a stockholder[26] unless the stockholder has estopped himself from denying the directors' title.[27] The necessity on which the rule depends requires that it apply only in favor of third persons[28] dealing with the corporation in ignorance of the defects in the directors' election,[29] but it must be admitted that it has not always been so limited.

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ENFORCEMENT OF AGREEMENTS TO SUPPORT AGED GRANTORS.—The attitude of the courts towards grants of all or a large part of an old man's property, in return for the grantee's promise to support him in his declining years, stands out as a strong refutation of the criticism that our legal system holds slavishly to precedent and technicalities. Though the law abhors a forfeiture, and it is a general rule of property that words will be construed most strictly in order to avoid divesting an estate,[1] it is eqally well settled that contracts to support aged or infirm grantors, in consideration of a conveyance of property to the obligor, who is generally a relative or very near friend, belong to a peculiar class to which different rules are applicable.[2] Almost without exception,[3] it

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[22]See Johnston *v.* Jones, *supra*; Moses *v.* Tompkins, *supra.*

[23]Commonwealth *v.* Smith, *supra*; Atlantic T. & O. R. R. *v.* Johnston, *supra.*

[24]*Accord,* Ellsworth Woolen Mfg. Co. *v.* Faunce (1887) 79 Me. 440, 10 Atl. 250.

[25]Ohio & Miss. R. R. *v.* McPherson, *supra*; Steinmetz *v.* Versailles etc. Co. (1877) 57 Ind. 457; San Joaquin Land etc. Co. *v.* Beecher (1894) 101 Cal. 70, 35 Pac. 349; Jones *v.* Bonanza Min. & Mill Co., *supra.*

[26]People's Mut. Ins. Co. *v.* Westcott (1860) 81 Mass. 440; Moses *v.* Tompkins, *supra*; Schwab *v.* Frisco Min. & Mill. Co. (1900) 21 Utah 258, 60 Pac. 940; Garden Gully etc. Co. *v.* McLister (1875) 1 App. Cas. 39.

[27]Schenectady etc. Co. *v.* Thatcher (1854) 11 N. Y. 102; Macon & Augusta R. R. *v.* Vason (1876) 57 Ga. 314; Faure Elect. etc. Co. *v.* Phillipart (1888) 58 L. T. Rep. N. S. 525.

[28]Savage *v.* Ball, *supra*; Moses *v.* Tompkins, *supra*; State *v.* Curtis, (1874) 9 Nev. 325; Matter of George Ringler & Co. (1912) 204 N. Y. 30, 97 N. E. 593.

[29]Mere knowledge of irregularities in election seems insufficient to bar a plaintiff's right to avail himself of the doctrine. Scanlan *v.* Snow, *supra.* But actual knowledge and participation in the election would appear to bar him. Vestry of St. Luke's Church *v.* Mathews (S. C. 1815) 4 Desauss. Eq. 578.

[1]4 Kent, Comm., *129.

[2]Bruer *v.* Bruer (1909) 109 Minn. 260, 123 N. W. 813; Cree *v.* Sherfy (1894) 138 Ind. 354, 37 N. E. 787; see Brady *v.* Gregory (1912) 49 Ind. App. 355, 97 N. E. 452; Russell *v.* Robbins (1910) 247 Ill. 510, 93 N. E. 324.

[3]Where the grantor stipulates merely for a money annuity, cancelation is denied, but the amount of the annuity is generally declared a lien on the

is held that on breach of such a contract the grantor is entitled to recover the land.[4] But, though courts are in substantial accord on the general proposition that relief should be given, it is interesting to note the variety of grounds that they resort to in order to afford such relief.[5] Some, seemingly affected by the injustice of allowing the grantee to retain the land without performing his agreement, give relief solely for that reason, without attempting to refer the relief to any specific head of equitable interference.[6] Others order cancelation because there is no adequate remedy at law,[7] or for failure of consideration.[8] In some jurisdictions, a condition of support in the grant itself, or expressed or implied extrinsically, is construed as a condition subsequent,[9] and a breach thereof, in the absence of a clear waiver,[10] upon re-entry, or an act legally equivalent thereto,[11] works a forfeiture of the estate conveyed.[12] Still another view is that such an agreement creates a mortgage on the property which may be foreclosed on breach.[13] Perhaps the most curious rule is that applied in Illinois,

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property. See Doescher *v.* Spratt (1895) 61 Minn. 326, 63 N. W. 736; Gallaher *v.* Herbert (1886) 117 Ill. 160, 7 N. E. 511. The annual value of support has been computed and declared a lien on the property to attach annually, Webster *v.* Cadwallader (1909) 133 Ky. 500, 118 S. W. 327; Laxton *v.* Tilly (1872) 66 N. C. 327; *contra,* Brawley *v.* Catron (1837) 35 Va. 522; see Camp *v.* Gifford (N. Y. 1874) 67 Barb. 434, or in a gross sum based on the grantor's expectancy of life. Storey-Bracher Lumber Co. *v.* Burnett (1912) 61 Ore. 498, 123 Pac. 66; *contra,* Diggins *v.* Doherty (1885) 18 D. C. 172; see Frazier *v.* Miller (1854) 16 Ill. 48. When the grantee dies before the grantor it was held that the latter can charge the land for her support, but is not entitled to rescission. Keister *v.* Cubine (1903) 101 Va. 768, 45 S. E. 285. And when the grantor is dead and his heirs or representatives sue, cancelation is frequently refused, since the damages are ascertainable. Self *v.* Billings (1913) 139 Ga. 400, 77 S. E. 562; see Studdard *v.* Wells (1894) 120 Mo. 25, 25 S. W. 201; *contra,* Fluharty *v.* Fluharty (1903) 54 W. Va. 407, 46 S. E. 199.

[4]The doctrine applies even though the deed is absolute on its face, and the obligation is in the form of a separate contract, Tysor *v.* Adams (1914) 116 Va. 239, 81 S. E. 76; Dodge *v.* Dodge (1892) 92 Mich. 109, 52 N. W. 296, a bond to perform, Frazier *v.* Miller, *supra,* a mortgage conditioned on performance, Richter *v.* Richter (1887) 111 Ind. 456, 12 N. E. 698, an oral promise, Sherrin *v.* Flinn (1900) 155 Ind. 422, 58 N. E. 549; Lockwood *v.* Lockwood (1900) 124 Mich. 627, 83 N. W. 613, or is implied from the fact of the conveyance. Beck *v.* Hoyt (1872) 39 Conn. 9.

[5]Abbott *v.* Sanders (1907) 80 Vt. 179, 66 Atl. 1032.

[6]Lockwood *v.* Lockwood, *supra.*

[7]Lowman *v.* Crawford (1901) 99 Va. 688, 40 S. E. 17.

[8]Alvey *v.* Alvey (1906) 30 Ky. L. R. 234, 97 S. W. 1106.

[9]But see Lowman *v.* Crawford, *supra.*

[10]Jones *v.* Williams (1909) 132 Ga. 782, 64 S. E. 1081; Hubbard *v.* Hubbard (1867) 97 Mass. 188.

[11]On the necessity of re-entry, see 8 Columbia Law Rev. 326.

[12]Cree *v.* Sherfy, *supra*; Blum *v.* Bush (1891) 86 Mich. 206, 49 N. W. 142; Thomas *v.* Thomas (1893) 24 Ore. 251, 33 Pac. 565. In Glocke *v.* Glocke (1902) 113 Wis. 303, 89 N. W. 118, the court points out that equity first implies a grant on condition subsequent, and then cancels the deed, not to enforce a forfeiture, but to remove a cloud on the grantor's title, which has already revested on breach of the condition.

[13]Abbott *v.* Sanders, *supra*; Chase *v.* Peck (1860) 21 N. Y. 581; but see Bethlehem *v.* Annis (1860) 40 N. H. 34; Glocke *v.* Glocke, *supra.*

where, on the obligor's failure to support the grantor, it is presumed that he accepted the deed with the intention of not performing his contract, and this implied fraud gives equity jurisdiction to cancel the deed.[14]

The recent case of *Huffman* v. *Rickets* (Ind. App. 1916) 111 N. W. 322, in a well considered opinion containing an exhaustive review of the authorities, fortifies the rule for the protection of aged grantors. There an old woman conveyed her property to her son and his wife, on condition that they support her for life. The grantees performed until the wife died and the husband became insane. The guardian of the latter tendered performance, but the grantor refused to receive it, and sued for cancelation of the deed. The court granted her petition, decreeing an accounting for the support already given.[15] It held that such a condition required personal care and companionship which only the grantee could render, and that, consequently, the obligation was non-delegable. Though this seems a just disposition of the case, it is by no means the undisputed rule, as many courts allow one not a party to the transaction to perform the grantee's agreement.[16]

Of all the methods of treating deeds in consideration of support noted above, that which construes such deeds as given on condition subsequent protects the grantor most amply. Under this view, the grantee must perform the agreement or risk losing his estate for failure,[17] and the grantor is not left to the inadequate remedy of accepting some substitute in place of that which he intended to receive. It has been suggested that the court might better guard the rights of both parties by treating such conveyances substantially as trusts,[18] thus gaining immediate equitable jurisdiction over the cause. Then it could appoint a receiver and administer the estate of the grantee as a trust asset,[19] or it could declare the grantee trustee and order him to carry out the

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[14]Frazier *v.* Miller, *supra*; McClelland *v.* McClelland (1898) 176 Ill. 83, 51 N. E. 559; see Spangler *v.* Yarborough (1909) 23 Okla. 806, 101 Pac. 1107. Under this doctrine, however, it is obvious that when the grantee performs until death and then his infant children default, since neither fraud nor bad faith in the grantee can be implied by reason of such default, the deed cannot be canceled, though the grantor has a lien on the land for support. Stebbins *v.* Petty (1904) 209 Ill. 291, 70 N. E. 673. Assuming that the obligation is delegable, this result is logical, but it seems to protect the interests of the grantee's heirs at the expense of the grantor. See Cross *v.* Carson (Ind. 1846) 8 Blackf. *138.

[15]The general rule is that the grantee is credited in the accounting with the value of permanent improvements and support, and charged with the amount of the rental value. Grant *v.* Bell (1904) 26 R. I. 288, 58 Atl. 951. But it has been held that the grantee cannot recover for support, Morgan *v.* Loomis (1891) 78 Wis. 594, 48 N. W. 109, or even for permanent improvements. See Daniels *v.* France (Ky. 1916) 182 S. W. 919.

[16]Such contracts are personal. Glocke *v.* Glocke, *supra*; Payette *v.* Ferrier (1899) 20 Wash. 479, 55 Pac. 629; Cree *v.* Sherfy, *supra*; *contra*, Stebbins *v.* Petty, *supra*; Keister *v.* Cubine, *supra*; Webster *v.* Cadwallader, *supra*.

[17]Thomas *v.* Thomas (1893) 24 Ore. 251, 33 Pac. 565.

[18]Barnes *v.* Barnes (1892) 23 D. C. 479. "While such contracts are not often in form a trust, they are usually in fact a trust. * * * We think it is much more consonant with the principles of equity to treat this as an implied trust, renounced by the donee, than to treat it as a mere contract." Grant *v.* Bell, *supra*.

[19]Keister *v.* Cubine, *supra*.

trust, to save his estate,[20] and, if he failed to do so, it could decree a reconveyance or cancelation.[21]

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EVENTS SUBSEQUENT TO THE CONTRACT AS A DEFENCE TO SPECIFIC PERFORMANCE.—The broad principle that equity, in its discretion, will deny specific performance where to grant it would impose a hardship on the defendant, appears from a consideration of the cases to resolve itself into the narrower rule that the contract will not be enforced where there is inadequacy of consideration due to the mental inferiority of the defendant; the fraud or failure of the plaintiff to disclose facts peculiarly within his knowledge, when under a duty to do so; or events subsequent to the contract which have rendered it unequal.[1] The frequent statement that the only question is whether the contract was fair and reasonable at the time when made[2] applies where specific performance will carry out the contract as originally intended by the parties, but admittedly does not preclude a defence based on subsequent events not within the contemplation of the parties when the contract was made.[3] The decisions in which such a defence has been sustained appear to rest on one or both of the following grounds: first, the fact that specific performance would impose on the defendant a burden utterly disproportionate to the benefit secured to the plaintiff;[4] and secondly, that a literal enforcement of the contract would violate the real intent of the parties.[5] That the latter is the more important element is apparent from the fact that where both are present the court prefers to rest its decision on the intent of the parties,[6] sometimes adding by way of dictum that even if the subsequent events were in the contemplation of the parties, nevertheless the

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[20]Cornell *v.* Whitney (1903) 132 Mich. 300, 93 N. W. 614.

[21]Reid *v.* Burns (1861) 13 Ohio St. 49; Grant *v.* Bell, *supra*; Cornell *v.* Whitney, *supra*; Abbott *v.* Sanders, *supra*.

[1]9 Columbia Law Rev., 68.

[2]See Prospect Park & C. I. R. R. *v.* Coney Island & B. R. R. (1894) 144 N. Y. 152, 39 N. E. 17; Willard *v.* Tayloe (1869) 75 U. S. 557.

[3]Willard *v.* Tayloe, *supra*.

[4]City of London *v.* Nash (1747) 3 Atk. 512; Kimberley *v.* Jennings (1836) 6 Sim. 340; Clarke *v.* Rochester L. & N. F. R. R. (N. Y. 1854) 18 Barb. 350. The denial of relief is frequently influenced by other equities such as laches of the plaintiff, Town of Huntington *v.* Titus (N. Y. 1900) 50 App. Div. 468, 64 N. Y. Supp. 58, or the interest of the public. Conger *v.* New York W. S. & B. R. R. (1890) 120 N. Y. 29, 23 N. E. 983. An additional ground for denying specific performance where the benefit to the plaintiff is very slight is the obvious adequacy of legal damages.

[5]King *v.* Raab (1904) 123 Iowa 632, 99 N. W. 306; Ferguson *v.* Blackwell (1899) 8 Okla. 489, 58 Pac. 647. In the leading American case, Willard *v.* Tayloe, *supra*, the contract provided for payment in "cash". Prior to the time for performance Congress declared government notes "legal tender". The court held that although government notes were "cash" at the time of the tender, the parties meant gold, and the plaintiff must pay him gold.

[6]Chicago & A. R. R. *v.* Schoeneman (1878) 90 Ill. 258; Trustees *v.* Thacher (1882) 87 N. Y. 311.